



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 18, 2003

The Honorable Tom Daschle
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Leader:

I write to correct a significant and recurring misstatement of fact regarding the nomination of Miguel Estrada, which has been repeated several times on the Senate floor in the past several weeks. As noted below, several Democrat Senators have asserted or implied their belief that the White House and the Department of Justice reviewed Mr. Estrada's appeal, certiorari and amicus recommendations authored during his tenure in the Bush and Clinton Solicitor General's Offices before deciding whether to nominate him to the D.C. Circuit, and that the decision not to disclose these memoranda is based on the Administration's knowledge of their contents. Nothing could be further from the truth. Despite the fact that Counsel to the President Alberto Gonzales explained in a February 24th letter to Senator Schumer that "[n]o one in the Executive Branch has reviewed these memoranda since President Bush took office in January 2001," Senators continue to repeat this allegation, which warrants this additional response. An identical letter will be sent to Majority Leader Frist.

Because the professional opinions of attorneys in the Solicitor General's office are—and always have been—confidential, no one in the White House, the Department of Justice or anywhere else in the Executive Branch reviewed these privileged documents—not before Mr. Estrada's nomination on May 9, 2001, and not since then. Unfortunately, the mistaken notion that the Administration has reviewed Mr. Estrada's memoranda has grown rapidly from speculation to rumor to purported fact. In order that your colleagues might have the most accurate information available during your deliberations on Mr. Estrada's nomination, we wish to point out specific misstatements and erroneous assumptions on this issue and to set the record straight.

In a February 12, 2003, floor speech, Senator Leahy speculated that the Administration knows what is in Mr. Estrada's confidential memoranda:

Regarding the document request related to Mr. Estrada's nomination, he has told both Senator Hatch and myself, as well as several Members of the Senate, that he is perfectly willing to show us his writings and respond to them and answer questions about them, but he has been told by the administration that he cannot: the administration, however, would review

those writings. They are the only ones who know whether this direct evidence of his views, the interpretation of law, is accurate or misleading—they are the only ones who have access to it and they say, basically: Trust us.

Congressional Record, Feb. 12, 2003, at S2251

Senator Durbin elevated the speculation to a conclusion on February 26:

Mr. Gonzales in the White House said, no, we will not consider producing anything. It leads Members to conclude on this side of the aisle that there is something very damaging in these materials that they do not want disclosed. It is the only conclusion you can draw ... this White House, tentative and concerned about whether or not Miguel Estrada has said some things that could jeopardize his nomination, refuses to disclose.

Congressional Record, Feb. 26, 2003, at S2756.

Several days later, Senator Schumer repeated the mistaken assumption that the Administration has reviewed Mr. Estrada's memoranda:

Why won't Mr. Estrada or the administration—which is his sponsor, his mentor—in this particular situation why won't he give up these documents? I will tell you what most people think when they hear about it. And I have talked to my constituents, the few who ask me about this. They say he is hiding something. Do I know he is hiding something? Absolutely not. I have not seen the documents. But I tell you one thing: The great lengths that the administration and my colleagues on the other side have gone to not give up these documents makes one suspect there is something there they do not want people to see. So the documents are crucial.

Congressional Record, Mar. 4, 2003, at S3064.

Senator Kennedy extended the error when he suggested that the Administration reviewed Mr. Estrada's memoranda in the selection and vetting process prior to nomination:

We certainly have the obligation to do so when the Executive Branch prevents us from exercising our assigned constitutional powers of advice and consent by depriving us of any access to the only documents which might tell us what kind of a judge a nominee will be—the very documents which the President's lawyers used to select and vet the nominee.

Congressional Record, Mar. 1, 2003, at S3434.

In a March 13, 2003, floor speech, Senator Leahy completes the cycle of misstatements when he asserted that the Administration reviewed Mr. Estrada's memoranda in deciding whether to nominate Mr. Estrada.

The real double standard in the matter of the Estrada nomination is that the President selected Mr. Estrada in large part based upon his 4 1/2 years of work in the Solicitor General's Office, as well as for his ideological views. The administration undoubtedly knows what those views are and have seen those work papers. They know what he did. They picked him based on that, but they said even though we picked him based on that, we do not want the Senate to know what it was. We in the Senate cannot read his work, the work papers that would shed the most light on why this 41-year-old should have a lifetime seat on the Nation's second highest court.

We are to a point where the White House simply says, trust us, we know what he wrote and how he thinks and will make decisions, but we do not want you to know what he wrote, just rubberstamp him.

. . . . There seems to be a perversion to require the Senate to stumble in the dark about Mr. Estrada's views when he shared these views quite freely with others, and when the administration selected him for this high office based on these views.

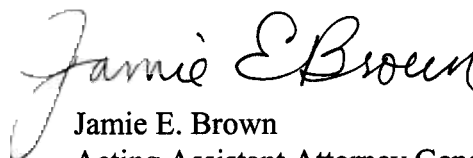
Congressional Record, Mar. 13, 2003, at S3671

These assertions are simply wrong. First, each statement is based on the fundamentally erroneous premise that officials in this Administration have seen Mr. Estrada's memoranda. Let me assure you unequivocally—and permanently put to rest any misunderstanding—that at no time has this Department of Justice or the White House ever reviewed the memoranda that Miguel Estrada wrote during his tenure in the Solicitor General's office.

Second, the statements above mistakenly suggest that the Department of Justice has declined to release Mr. Estrada's memoranda because of concerns over their content. In reality, as we have explained, the Department has chosen to keep these documents confidential for the reason articulated by all seven living former Solicitors General—including four Democrats: “Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests.”

Thank you for allowing me to set the record straight on this important point. I appreciate the opportunity to assure you and your colleagues that we in the Administration have never examined Miguel Estrada's confidential memoranda. I hope that by clearing up this misunderstanding, we will have taken an important step toward ending the filibuster of Mr. Estrada—the first filibuster of a lower-court nominee in American history—and allow the bipartisan majority of Senators who support Mr. Estrada to vote on his confirmation.

Sincerely,

A handwritten signature in cursive script that reads "Jamie E. Brown". The signature is written in dark ink and is positioned above the printed name and title.

Jamie E. Brown
Acting Assistant Attorney General

cc: The Honorable Orrin Hatch
The Honorable Patrick Leahy
The Honorable Edward Kennedy
The Honorable Charles Schumer
The Honorable Richard Durbin
The Honorable Alberto R. Gonzales, Counsel to the President